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No. 02-

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IN THE

Supreme Court of the United States

RAYTHEON COMPANY,

Petitioner,

v.

JOEL HERNANDEZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Americans with Disabilities Act confers preferential rehire rights on employees lawfully terminated for misconduct, such as illegal drug use.

PARTIES TO THE PROCEEDING

Joel Hernandez, the plaintiff in the trial court and the respondent here, formerly was employed by, and later sued, Hughes Missile Systems Company, a subsidiary of Hughes Aircraft Company. (As noted in the Corporate Disclosure Statement, Raytheon Company subsequently purchased Hughes Aircraft Company and its subsidiaries.)

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6, Petitioner Raytheon Company states that it purchased defendant-petitioner Hughes Aircraft Company (and, with it, the subsidiary Hughes Missile Systems Company). Raytheon Company has no parent corporation and no publicly held company owns 10% or more of its stock.

Neither Hughes Electronics Corporation (Hughes Aircraft Company's former parent) nor General Motors Corporation (formerly part owner of Hughes Electronics Corporation) has any financial interest in this litigation.

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Petitioner[1] respectfully prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Hernandez v. Hughes Missile Systems Co.*, 298 F.3d 1030 (9th Cir. 2002).

OPINIONS BELOW

The initial opinion of the United States Court of Appeals for the Ninth Circuit in this case, dated June 11, 2002, is not reported, but is reproduced at 2002 U.S. App. LEXIS 16163 and in the Appendix ("Pet. App.") at 1a-13a. In response to a petition for rehearing, the panel amended its initial opinion; that amendment is reproduced at Pet. App. 14a, and the opinion as amended is reported at 298 F.3d 1030. The order of the district court granting the Company's motion for summary judgment is unreported and reproduced at Pet. App. 16a-17a.

STATEMENT OF JURISDICTION

Jurisdiction existed in the district court under 28 U.S.C. § 1331. The court of appeals' initial panel opinion was issued on June 11, 2002. A timely petition for rehearing and suggestion for rehearing *en banc* was filed. The panel denied the rehearing petition but issued its amended opinion on August 11, 2002. The suggestion for rehearing *en banc* was denied the same day. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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1. As noted in the Corporate Disclosure Statement, Hughes Missile Systems Company was acquired by Raytheon Company. Respondent Hernandez worked at and sought rehire by Hughes before the Raytheon acquisition, so the petitioner here is designated as "Hughes" or "the Company" throughout.

STATUTORY PROVISIONS INVOLVED

The Americans with Disabilities Act is codified at 42 U.S.C. §§ 12101-12213. The relevant provisions of the Act are reproduced at Pet. App. 19a.

STATEMENT OF THE CASE

1. Respondent Joel Hernandez formerly worked for Hughes, most recently as a calibration technician. Hernandez worked on missile systems sold to the U.S. government. Hernandez's job performance generally was acceptable, although he nearly had been terminated for absenteeism in 1986. Hernandez attributed his absences then to alcoholism. He completed a program of alcohol rehabilitation, and he was allowed to remain at work.

About five years later, in July 1991, Hernandez reported for work exhibiting signs of substance abuse. Hernandez was given a drug test. He tested positive for cocaine. Hughes' policy at the time provided for the discharge of any employee "testing positive for . . . drugs on a test requested by the Company." Pet. App. 7a. The Company therefore gave Hernandez a choice: resign or be terminated. Hernandez chose to resign. Upon his departure, the Company noted in Hernandez's personnel file that he had "quit in lieu of discharge . . . for personal conduct." *Id.* at 4a.[2]

2. Although Hernandez's departure in 1991 was at least technically a resignation, "[t]here is no question that Hughes applied this policy [against re-employment of those terminated for misconduct] in rejecting Hernandez's application." Pet. App. 12a n.17. Because Hernandez's 1991 resignation came only in the face of impending termination, the parties and the courts below treated his departure as an involuntary discharge. For purposes of this petition, the Company does so as well.

2. The Company had (and still has) a "policy against rehiring former employees who were terminated for any violation of its misconduct rules." Pet. App. 11a. In 1994, Hernandez reapplied for a job with Hughes.[3] The application was forwarded to Hughes' Labor Relations Department. Because the application indicated that Hernandez previously had worked for Hughes, the responsible Labor Relations employee pulled Hernandez's personnel file, noted that he had "quit in lieu of discharge," and summarily rejected the application.

3. Hernandez filed an administrative charge of discrimination, and subsequently this lawsuit, alleging a violation of the Americans with Disabilities Act ("ADA"). Hernandez did not challenge his 1991 termination, did not assert that he had a "disability" within the meaning of the statute at the time of his termination, and did not claim that, when he reapplied to work at Hughes, he suffered from any physical or mental condition that might impair his ability to engage in any major life activity.

Rather, Hernandez claimed that, at the time his reapplication was rejected, he had a "record of . . . an impairment," 42 U.S.C. § 12102(2)(B), and/or that Hughes "regarded [him] as" having an impairment, *id.* § 12102(2)(C). Hernandez contended that his drug use was causally related to an addiction (from which he since had been rehabilitated). Hughes, he alleged, relied on that "record of an impairment" to deny him a job in 1994. Thus,

3. Hernandez filed his application with two letters of reference, one from his pastor, and another from a counselor who said that Hernandez attends Alcoholics Anonymous meetings regularly. Neither the application nor the reference letters spoke of drug use or drug rehabilitation.

Hernandez argued, Hughes acted unlawfully when it applied to him its facially neutral rehire-disqualification policy. According to Hernandez, his drug addiction (though warranting his *discharge* in 1991) bolstered his *application for rehire* in 1994.

4. The district court rejected this argument and granted Hughes' motion for summary judgment.

5. A panel of the Ninth Circuit (per Reinhardt, J.) reversed. The court acknowledged that when Hernandez was terminated in 1991, he was not a "person with a disability" protected by the ADA. Indeed, the court conceded, Congress in 42 U.S.C. § 12114 had expressly *excluded* "current" drug users from ADA coverage. Pet. App. 5a-6a. The court observed, however, that once Hernandez completed rehabilitation (which Hernandez claimed to have done after leaving Hughes), evidence in Hughes' files of his prior drug use (which then was not a statutorily covered "disability") nonetheless gave him a "record" of a disability, entitling him to the protection of the Act when he applied for reemployment in 1994.

The court thus concluded that the ADA confers preferential treatment upon individuals who are fired for drug-related misconduct. Hughes, the court allowed, was entitled to reject summarily any application for employment submitted by an individual previously fired for most forms of misconduct. If, however, the prior misconduct was in some fashion related to illegal drugs, then the ADA confers preferential rehire rights, in the form of a second chance:

> . . . Hughes's . . . policy against rehiring former employees who were terminated for any violation of its misconduct rules, although lawful on its face, *violates the ADA as applied to former drug addicts whose only work-related offense was testing positive [for drug use but] ha[ve] been successfully rehabilitated. . . .*

Pet. App. 11a (emphasis added).

REASONS FOR GRANTING THE PETITION

The Company respectfully suggests that this Court should grant *certiorari* and summarily reverse, or, in the alternative, set the case for plenary briefing and argument.[4]

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4. Reinstating the summary judgment would terminate the case, and thus review now is ripe. *See US Airways, Inc. v. Barnett*, __ U.S. __, 122 S. Ct. 1516 (2002) (granting employer's petition for *certiorari* following appellate court's reversal of summary judgment for employer in ADA action); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002) (same); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (same); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991) (granting *certiorari* following reversed summary judgment in securities fraud suit brought by respondents). Moreover, this case in particular is not one that would profit by any further factual development; indeed (if the Ninth Circuit's opinion were to stand) there would be little if anything left to try. The Ninth Circuit correctly noted that "[t]here is no question that Hughes applied th[e] [no-rehire] policy in rejecting Hernandez's application." Pet. App. 12a n.17. Whether such a policy is lawful is what this case is about, and that question is squarely presented now; the Company's defense on the merits lies in the text of the ADA and the cases interpreting it, not on further facts that might be elicited at a trial. Review by this Court therefore ought not be deferred until any later time. *See United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964).

I. THE DECISION BELOW IGNORES DIRECTLY APPLICABLE STATUTORY LANGUAGE AND CREATES A CONFLICT IN THE COURTS OF APPEALS ON A RECURRING QUESTION OF FEDERAL LAW

Many companies disqualify discharged persons from rehire. Such a no-rehire rule provides an essential form of institutional memory to help ensure that failed former employees do not slip back into an organization simply because hiring personnel do not know (or have forgotten) why former employees earlier departed. No-rehire rules are particularly common where: (i) the employer's business involves hazardous materials, confidential information, or particularly demanding job requirements (here, for example, the Company contracts with the U.S. Government to build missile systems); and (ii) the misconduct leading to the termination was aggravated (here, for example, illegal cocaine use).

The Ninth Circuit's decision draws into question the validity of these no-rehire rules. As shown below, the decision:

- Cannot be reconciled with the ADA's text, or with this Court's decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002);
- Conflicts directly with circuit cases upholding similar no-rehire rules; and
- Departs from long lines of appellate decisions that hold that (i) employee misconduct lawfully may be the subject of discipline, even when causally related to a disability, and (ii) the ADA does not require that persons with disabilities be given a "second chance" not available to others.

A. The Decision Conflicts With The Text Of The ADA, And With This Court's Decision In *Williams*.

Congress in enacting the ADA took pains not to give special rights to drug users.[5] To ensure that the Act would not be used as a safe harbor for those who use illegal drugs or provide an excuse for drug-related misconduct, Congress addressed the issue directly in the statute's text. Specifically, the Act: (i) defines the term "qualified individual with a disability" to *exclude* those currently using illegal drugs; (ii) expressly authorizes employers to prohibit the use of illegal drugs on the job, and to prohibit employees from arriving at work with drugs in their systems; and (iii) expressly permits employers to apply uniform "qualification standards for employment" and uniform standards for "job performance and behavior [to those who engage in the use of illegal drugs] even if [the] unsatisfactory performance or behavior is related to . . . drug use. . . ." 42 U.S.C. §§ 12114(c)(1), (2) & (4). Thus, when an employer takes action against "any employee or applicant" because of behavior "related to . . . drug use," it acts lawfully. *Id.* § 12114(a).

At Hughes (like thousands of U.S. companies), persons engaging in aggravated work-related misconduct face two

5. *See, e.g.*, 135 Cong. Rec. S11224-01, S11225, 101st Cong. 1st Sess. (September 15, 1989) (statement of Sen. Harkin) (addressing an amendment to the bill specifically added to address concerns regarding the application of the ADA to drug addicts), *reprinted in* 1990 U.S.C.C.A.N. 303, 359-60 (1990).

consequences. First, the individual is fired. Second, the individual loses the right to be considered for subsequent employment. Theft is treated this way, whether it stems from greed or kleptomania. Workplace assault is treated this way, whether it stems from poor judgment or from bipolar disorder. Drug use is treated this way also: Hughes does not tolerate workers who arrive to work with cocaine in their systems, whether the drug use is "recreational" or habitual.

Thus, to Hughes (and to Congress in enacting the ADA), it was irrelevant whether or not Hernandez's 1991 drug use stemmed from an alleged addiction. Hernandez would have been fired, and he would have been barred from reemployment, regardless of the frequency or cause of his decision(s) to use cocaine. When Hernandez was discharged for testing positive for cocaine while on the job, Hughes held him "to the same standards [of] . . . behavior that [it uniformly applied] to other employees [even though the specific kind of] behavior [in which he engaged was] related to . . . drug use." 42 U.S.C. § 12114(c)(1). And when it subsequently rejected Herndandez's application for prior, terminable misbehavior, it merely enforced its no-rehire rule, a "qualification standard[] for employment . . . that [it applies] to other" employees who seek to be rehired, regardless of the nature of the prior misbehavior. *Id.* § 12114(c)(4).

The court of appeals did not refer to the controlling statutory language. The court acknowledged that the lawfulness of the original termination was not at issue, Pet. App. 5a n.7, but simply ignored the implication of § 12114 for the *second* consequence that followed from Hernandez's misconduct: lawful disqualification from future employment. Hughes was entitled to treat Hernandez in a nondiscriminatory way, to impose in his case precisely the

same sanction applicable to any other form of serious misbehavior. The ADA promises nondiscrimination; it does not promise to insulate drug abusers from the consequences of their misconduct. Because (as the statute says) an employer may apply the same standards and impose the same sanctions for drug-related misconduct as it does to other sorts of misconduct — even if there is a disability lurking in the background — the Ninth Circuit's opinion is demonstrably wrong.[6]

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6. Ironically, if anyone erroneously "regarded [Hernandez] as" a person with a disability, it was the Ninth Circuit itself, in treating drug addition as a categorical disability in violation of the rule in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002). *Williams* taught that whether someone has a statutory disability turns, not on labels, but on a detailed, person-specific analysis of whether an individual is substantially limited in a major life activity. *Id.* at 196-99. The Ninth Circuit here failed to heed the teaching of *Williams*. The court assumed that, because Hernandez was an addict, he necessarily had a statutory disability (and, thereafter, that he was "regarded as" having had one). Pet. App. 6a n.9. But this is not so. Hernandez did not have a covered disability in 1991 when he was fired. 42 U.S.C. § 12114(c)(1). And the court undertook no analysis of whether, at the time Hernandez reapplied (or at any other time), he was impaired in any major life activity. The court of appeals evidently believed that this analysis was unnecessary because of its holding that the Company "regarded [Hernandez] as" having a disability. *Id.* But the court made two analytical errors. First, Hughes did not "regard [Hernandez] as" anything other than what he was: a person ineligible for rehire because of prior misconduct. Second, even if it were true that the Company "regarded [Hernandez] as" a former *drug addict*, that would not end the inquiry, because one can determine whether an "addiction" (or any other condition or disease) is a "disability" only by conducting the kind of person-specific analysis that *Williams* mandated. The Ninth Circuit's treatment of the issue thus conflicts with *Williams* and other cases that correctly

(Cont'd)

B. The Decision Creates A Conflict In The Circuits On The Validity Of No-Rehire Rules.

The Ninth Circuit's decision directly conflicts with several others. In *Harris v. Polk County*, 103 F.3d 696 (8th Cir. 1996), for example, the plaintiff alleged that she had a mental illness that proximately caused the shoplifting incident for which she had been terminated. *Id.* When she applied for reemployment, the employer summarily rejected the application because, as a matter of "office policy," it refused to hire individuals known to have been guilty of unlawful conduct. *Id.* at 696. Rejecting the plaintiff's argument that the ADA sheltered her from the consequences of her disability-related misconduct, the Eighth Circuit observed that "an employer [must be able to] hold disabled employees to the same standard of law-abiding conduct as all other employees." *Id.* at 697.

Similarly, in *Johnson v. New York Hospital*, 1999 U.S. App. LEXIS 20151 (2d Cir. Aug. 20, 1999), the plaintiff had been terminated from his job for assaulting other employees while he was off duty. The plaintiff attributed his misconduct

(Cont'd)
require the plaintiff to prove that he or she had (or was regarded as having) an *actual disability*. *See, e.g., Burch v. Coca-Cola Co.*, 119 F.3d 305, 315-316 & 318 n.16 (5th Cir. 1997) (plaintiff's status as alcoholic is not sufficient to warrant a finding of disability, which requires an individualized inquiry into the impact on the plaintiff's major life functions), *cert. denied*, 522 U.S. 1084 (1998); 29 C.F.R. App. § 1630.2(k) (a "record of an impairment" violation exists only if "the record relied on by an employer indicates that the individual has or has had a substantially limiting impairment. The impairment indicated in the record must be an impairment that would substantially limit one or more of the individual's major life activities.").

to a disability. When he reapplied for a job, the employer rejected him, citing its "policy of not rehiring any employee who has been discharged." *Id.* at *2. The Second Circuit rejected the notion that the ADA immunized the plaintiff from the consequences of his misconduct or mandated special exceptions for conduct that may have a nexus to a disability.

Flynn v. Raytheon Co., 94 F.3d 640, 1996 U.S. App. LEXIS 20837 (1st Cir. 1996) (unpublished opinion), *aff'g* 868 F. Supp. 383 (D. Mass. 1994), is almost precisely on point (and coincidentally involves petitioner here). In *Flynn*, the plaintiff was fired for reporting to work under the influence of alcohol. The plaintiff did not dispute that the discharge was lawful; rather, he sued over Raytheon's decision not to consider him for reinstatement or rehire. But the First Circuit affirmed summary judgment, noting that

> the ADA does not require an employer to rehire a former employee who was lawfully discharged for repeated disability-related failures to meet its legitimate job requirements, *viz.*, punctuality and sobriety. . . . Flynn cites no authority for his claim that the ADA entitles him to a "second chance" to meet Raytheon's legitimate work requirements. . . .

Id. at *4-5.

Numerous other cases are to the same effect. *E.g., Peyton v. Otis Elevator Co.*, 72 F. Supp. 2d 915, 920 (N.D. Ill. 1999) (plaintiff was fired for alcohol-related absences; plaintiff then unsuccessfully applied for rehire; § 12114(c)(4) "precludes [any ADA claim] because it does not require an employer to give any special concessions to misconduct caused by drugs or alcohol"); *Thomas v. Mississippi State Dep't of Health*, 934 F. Supp. 768, 773 (S.D. Miss. 1996) (plaintiff was

terminated for use of crack cocaine; a disability discrimination claim based on a denial of rehire was "completely undermined by § 12114(c)(4)"); *cf. Martin v. Barnesville Exempted Village Sch. Dist.*, 209 F.3d 931, 935 (6th Cir.) (plaintiff, a custodian at a public school, was seen drinking alcohol on the job; he subsequently sought and was denied a position as bus driver; the court rejected as "absurd on its face" the notion that the ADA required the school district to give the plaintiff the position; "ADA does not protect plaintiff from [the consequences of] his own bad judgment in drinking on the job"), *cert. denied*, 531 U.S. 992 (2000).[7]

And the conflict in the circuits runs deeper even than that. Two lines of cases are implicated. The first establishes that employers have the right to articulate and enforce generally applicable rules of conduct, and to discipline or terminate employees for violating those rules, without running afoul of the ADA. Put differently, a plaintiff does not secure ADA protection by saying, "a disability made me do it":

- *Maddox v. University of Tenn.*, 62 F.3d 843 (6th Cir. 1995) — An assistant football coach was fired after he was arrested for public intoxication and driving under the influence of alcohol. The plaintiff alleged he was terminated because of his disability of

7. Judge Reinhardt's opinion here even departs from prior (unpublished) Ninth Circuit precedent. In *Caniano v. Johnson Controls*, 1999 U.S. App. LEXIS 20648 (9th Cir. Aug. 26, 1999), plaintiff was terminated following a long string of absences. After the termination, he attributed his absences to a disability, dysthemia, and asked to be reinstated or rehired. The Ninth Circuit declined to read the ADA to require an employer "to rehire a legitimately terminated employee upon the employee's demonstration that he [now] could perform the job" satisfactorily. *Id.* at *4.

alcoholism, but the Sixth Circuit drew a distinction between employment actions based on *behavior* and those based on *disability*. Alcoholism may have compelled the plaintiff to drink, the court observed, but it did not compel him to drive.

- *Pernice v. City of Chicago*, 237 F.3d 783 (7th Cir. 2001) — The plaintiff was arrested for possession of cocaine and disorderly conduct, and was discharged. The Seventh Circuit held that an employer can terminate an employee for violations of valid work rules that apply to all of its employees, even if the employee's violation of the rule occurred because of a disability.

- *Bekker v. Humana Health Plan, Inc.*, 229 F.3d 662 (7th Cir. 2000), *cert. denied*, 532 U.S. 972 (2001) — A doctor was terminated after patients and other doctors complained to the employer that she smelled of alcohol and had glassy eyes on numerous occasions. The doctor denied that she had been drinking on the job, and she alleged that her employer regarded her as having a disability — alcoholism. Whatever her disability status, the court held, her breach of the employer's rules justified her termination.

- *Taub v. Frank*, 957 F.2d 8 (1st Cir. 1992) (Rehabilitation Act case) — The plaintiff was arrested for heroin possession with intent to distribute and was terminated. The plaintiff claimed he had a drug addiction, which led to his heroin possession, and argued that his termination therefore was unlawful. The First Circuit held that, disability or no, the Postal

> Service was entitled to enforce uniformly its rule that employees be of "good character and reputation" and to prohibit employees from engaging in "criminal conduct."

These cases all confirm that an employer is not obligated to "give any special concessions to misconduct caused by drugs or alcohol." *Peyton*, 72 F. Supp. 2d at 920. The decision below is to the contrary.

Juxtapose that line of ADA cases against a second line, which holds that a "second chance," after once failing to meet the rules of workplace deportment, is not a reasonable accommodation for a person with a disability. *E.g.*, *Siefken v. Village of Arlington Heights*, 65 F.3d 664, 666-67 (7th Cir. 1995) ("Siefken is not asking for an accommodation; . . . [h]e is asking for another chance. . . . But the ADA does not require this."); *Burch*, 119 F.3d at 320 (the employer need not grant a second chance to a person guilty of alcohol-related misconduct); *Hill v. Kansas City Area Transp. Auth.*, 181 F.3d 891, 894 (8th Cir. 1999) (the plaintiff was discharged for sleeping on the job, which she said was brought on by medication for her disability; the ADA does not require giving the employee a "second chance" to conform to the employer's rules), *cert. denied*, 528 U.S. 1137 (2000); *Burroughs v. City of Springfield*, 163 F.3d 505, 507 (8th Cir. 1998) (plaintiff became dysfunctional due to seizures that resulted from his failure to take his medication; "Burroughs failed to meet th[e] [employer's] legitimate expectation . . . , and the ADA does not require the City to provide him another chance. . . .").

Taken together, these two lines of cases establish that an employer need not: (i) tolerate in the first instance; or (ii) provide a "second chance" for, drug-related (or other) misconduct, even where the misconduct was related to a disability. The Ninth Circuit's decision here cannot be reconciled with these lines of cases. The Ninth Circuit here has held that an individual lawfully terminated for misconduct can use the ADA to secure preferential treatment, in the form of just such a second chance. But the right to terminate means nothing if the terminated employee can wait — a week, a month, a year, or a decade — and conjure up an ADA violation by the simple expedient of filing a new job application. The ADA does not require employers to abide that sort of revolving door.[8]

II. THIS CASE IS APPROPRIATE FOR SUMMARY REVERSAL

This case warrants consideration for summary reversal.[9] There is no substantial doubt that the Ninth Circuit's decision was wrong. It contravenes the express language of the ADA, upsets the evident intention of Congress in enacting the law, and conflicts with substantial contrary authority.

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8. This case thus has precedential significance well beyond the context of drug-related misconduct. It will be cited as conferring statutory "second chance" rights on individuals who are guilty of a wide range of misconduct, as long as they are able to suggest that the misconduct was attributable to a disability of some sort.

9. Sup. Ct. R. 16.1. The Court has used summary reversal to decide cases that involve (i) well-settled law; (ii) undisputed facts; and/or (iii) a clearly erroneous lower court decision. *See, e.g.*, *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001) (summarily reversing where opinion below "cannot remotely" be reconciled with what "[the Court's] cases require"); *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 505, 510 (2001) (summarily reversing where decision below was "baffling" and "conflict[ed] with [this Court's] cases"); *Ohio v. Reiner*, 532 U.S. 17, 18 (2001) (summarily reversing where the facts were clear and the Court's "precedents dictate" reversal).

Summary treatment is particularly appropriate because two distinct grounds for summary judgment exist. First, as shown above, nothing in the ADA prohibits employers from applying no-rehire rules to persons guilty of substantial workplace misconduct. Second, the Company was entitled to summary judgment on a narrower ground. Whatever may be the lawfulness of no-rehire rules in general, it is undisputed that the person who enforced the no-rehire rule in Hernandez's case *did not know*: (i) what kind of misconduct Hernandez had committed when he was discharged in 1991; or (ii) that Hernandez had been addicted to drugs. Pet. App. 7a-8a. Because the decisionmaker did not know of his addiction, it is analytically impossible for her to have engaged in disparate treatment based on that addiction.[10] *Cf. Breeden*, 532 U.S. at 273 (summarily reversing the Ninth Circuit; it is analytically impossible to retaliate based on something not known at the time the adverse employment decision is made). But Judge Reinhardt's opinion here declared that the decisionmaker's ignorance of the facts underlying Hernandez's termination was *itself* a violation of the ADA:

> If [the decisionmaker] in fact did not know the reasons for Hernandez's "termination," *her lack of knowledge would have been due solely to Hughes's unlawful policy which shields its employees from the knowledge that an employment decision may be illegal.* Maintaining a blanket policy against rehire of *all* former

10. Hernandez stated only a claim for disparate treatment. He attempted to assert an adverse impact theory for the first time in his summary judgment papers, but the district court and the court of appeals both rejected that attempt as untimely. Pet. App. 13a n.20. The court of appeals evaluated Hernandez's claim as one alleging disparate treatment only.

> employees who violated company policy . . . may well result, as Hughes contends it did here, in the staff member who makes the employment decision remaining unaware of the "disability" and thus of the fact that she is committing an unlawful act. *Having willfully induced ignorance on the part of its employees who make hiring decisions, an employer may not avoid responsibility for its violation of the ADA by seeking to rely on that lack of knowledge.*

Pet. App. 12a (first and third emphasis added).

Until now, no case had ever held that employers should (let alone were statutorily obliged to) inform decisionmakers of employees' sensitive personal information. Indeed, the ADA itself elsewhere teaches that employers should *limit* access to information about the disabilities of employees to the greatest degree possible. *See, e.g.*, 42 U.S.C. § 12112(d)(3) (obligating employers to segregate, in a separate file, any "information obtained regarding the medical condition" of an applicant, and severely limit the access of management employees to the information in those medical files).

In sum, whether it be on the narrow ground that the decisionmaker did not know of the (alleged) disability, or on the broader ground that the ADA does not confer on drug users an exception from generally applicable no-rehire rules, the Ninth Circuit's decision is startling, and plainly wrong.

CONCLUSION

The Court should grant the petition for *certiorari* and consider summary reversal of the court of appeals.

Respectfully submitted.

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APPENDIX

APPENDIX A — OPINION, ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JUNE 11, 2002 AND AMENDED AUGUST 12, 2002

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01-15512

D.C. No.
CV-98-00319-JMR

JOEL HERNANDEZ,

Plaintiff-Appellant,

v.

HUGHES MISSILE SYSTEMS COMPANY, an Arizona corporation;
HUGHES AIRCRAFT COMPANY, a Delaware corporation;
RAYTHEON COMPANY, a Delaware corporation,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Arizona
John M. Roll, District Judge, Presiding

Argued and Submitted
February 14, 2002—San Francisco, California

Filed June 11, 2002

Appendix A

Before: Stephen Reinhardt, Frank Magill* and Raymond C. Fisher, Circuit Judges.

Opinion by Judge Reinhardt

OPINION

REINHARDT, Circuit Judge:

In July 1991, Plaintiff Joel Hernandez was given a drug test at his place of employment and tested positive for cocaine. He had worked for the Defendant, Hughes Missile Systems Company ("Hughes")[1] for approximately twenty-five years, first as a janitor, and at the time of his positive drug test, as a Calibration Service Technician. Hughes was also aware at this time that Hernandez struggled with an alcohol problem. Rather than being terminated, Hernandez was given the option to resign in lieu of termination, which he chose to do. On the "Employee Separation Summary" filled out at the time of his resignation, was the handwritten note that Hernandez "quit in lieu of discharge" and that the reason for his leaving was "discharge for personal conduct."

Over two years passed and on January 24, 1994, Hernandez applied to be rehired by Hughes as a Calibration

* The Honorable Frank Magill, United States Circuit Judge for the Eighth Circuit, sitting by designation.

1. Hughes Missile Systems Company has been acquired by Raytheon Company. For the sake of continuity, we will refer to the Defendant as "Hughes."

Appendix A

Service Technician or a Product Test Specialist.[2] Hughes rejected the application. Subsequently, in June 1994, Hernandez filed a charge with the Equal Employment Opportunity Commission ("EEOC"), alleging that his application was rejected because of his disability, specifically, because of his record of drug addiction. The EEOC issued a right to sue letter. Hernandez then filed this action under the Americans with Disabilities Act ("ADA") and the district court granted Hughes's motion for summary judgment. We reverse.

When Hernandez applied to be rehired, he attached to his application a copy of his resumé and two reference letters. The first letter was from a pastor of Hernandez's church. It stated that Hernandez was a "faithful and active member." The second letter was from John L. Lyman, M.S., a counselor who stated that he works with recovering alcoholics and that Hernandez attends A.A. regularly, maintains his sobriety, and has a strong commitment to his recovery. On his application, Hernandez checked the "yes" box in response to the question whether the applicant had previously worked for Hughes.[3]

Hernandez's application was forwarded to Hughes's Labor Relations Department where it was reviewed by Ms. Joanne Bockmiller. Because Hernandez indicated that he had previously worked for Hughes, Bockmiller testified in her deposition that she pulled his personnel file and reviewed his employee separation sheet. She stated

2. At that time, there were seven openings for the position of Product Test Specialist.

3. The application also asked, "If yes, when?" to which Hernandez replied "1991."

that once she saw that he "quit-in-lieu of discharge," he concluded that he was ineligible for rehire. Bockmiller testified that she made this decision based on the company's unwritten policy of not rehiring former employees whose employment ended due to termination or resignation in lieu of termination.[4] Bockmiller testified that at the time she made the decision not to rehire Hernandez, she did not know the grounds for, or the conduct underlying, his resignation.

Hughes submitted a statement to the EEOC in response to Hernandez's charge. On July 15, 1994, George Medina, Manager of Diversity Development for Hughes, wrote that "[Hernandez's] application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation." The letter went on to state that "[t]he Company maintains it's [sic] right to deny re-employment to employees terminated for violation of Company rules and regulations." On November 20, 1997, the EEOC issued a determination on the merits of Hernandez's complaint. The EEOC found "reasonable cause to believe that [Hernandez] was denied hire . . . because of his disability."[5]

4. It is not clear on the record before us the difference between "termination" and "resignation in lieu of termination." Although there may be a difference in terms of what former employees can report to future potential employers, for the purposes here—the rehiring of former employees—there appears to be no difference in Hughes's treatment of employees who were terminated as opposed to those who resigned under threat of termination.

5. The EEOC attempted to conciliate the dispute between the parties but to no avail. On June 22, 1998, the EEOC issued Hernandez a right to sue letter.

Following Hernandez's filing of this action on July 6, 1998, Hughes asserted that he had failed to make a *prima facie* case of discrimination. It further argued that even if he had established a *prima facie* case, he had failed to demonstrate that its proffered nondiscriminatory reason for not rehiring him was a pretext for discrimination. After hearing oral argument on Hughes's summary judgment motion, the district court granted it without any explanation of its reasons for doing so. Hernandez appealed.[6]

Hernandez argues that, in rejecting his application for rehire, Hughes discriminated against him on the basis of a disability in violation of Title I of the ADA.[7] *See* 42 U.S.C. § 12112 (2002). In order to establish a *prima facie* case of discrimination, a plaintiff must demonstrate that 1) he is disabled within the meaning of the ADA; 2) he is a qualified individual able to perform the essential functions of the job; and 3) his employer terminated or refused to rehire him because of his disability. *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1246 (9th Cir. 1999). With regard to the first element, a "disability" under the ADA is defined as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

6. We review a grant of summary judgment *de novo*. *Humphrey v. Memorial Hosps. Assoc.*, 239 F.3d 1128, 1133 (9th Cir. 2001).

7. There is no question (nor does Hernandez raise one) regarding the propriety of his discharge in 1991 when he tested positive for cocaine. *See* § 12114(c); 29 C.F.R. § 1630.3(a); *Collings v. Longview Fibre Co.*, 63 F.3d 828, 832 (9th Cir.1995).

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

§ 12102(2). Hernandez does not claim that he was actually disabled at the time he applied to be rehired by Hughes in 1994. Rather, he argues that he was not rehired because of his record of disability, and/or because he was regarded as being disabled.[8] *See* § 12102(2); *Thompson v. Davis*, 282 F.3d 780, 784 (9th Cir. 2002). Thus, in order to make a *prima facie* case, Hernandez must present sufficient evidence that he was not rehired by Hughes because of his record of drug addiction or because he was perceived as being a drug addict, as well as demonstrating that he is qualified for the position he seeks.[9]

8. The parties agree that Hernandez's claim of discrimination is limited to either a "regarded as" or a "record of" definition of disability.

9. Although it is possible that a drug *user* may not be "disabled" under the ADA if his drug use does not rise to the level of an addiction which substantially limits one or more of his major life activities, in this case, it is not disputed that Hernandez was a drug *addict* and that his positive drug test formed a record of his addiction. In other words, it is not disputed that Hernandez was "disabled" within the meaning of the ADA at the time he resigned in lieu of termination, and a record of that disability existed. *See* 28 C.F.R. § 35.104 ("The phrase physical or mental impairment includes . . . drug addiction, and alcoholism."); *Thompson v. Davis*, 282 F.3d 780, 784 (9th Cir. 2002) ("Drug addiction that substantially limits one or more major life activities is a recognized disability under the ADA."); *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1187 (9th Cir. 2001) (stating that alcoholism is a protected disability under ADA); *Mararri v. WCI Steel, Inc.*, 130 F.3d 1180, 1185 (6th Cir. 1997) ("There is no dispute that alcoholism is a disability within the protection of the ADA.").

Hernandez points to Hughes's position statement to the EEOC as direct evidence that he was not rehired because of his record of drug addiction. As mentioned previously, in this statement Hughes wrote that "[Hernandez's] application was rejected based on his demonstrated drug use while previously employed." It also stated that Hernandez was discharged for violating Rule and Regulation No. 7 which states:

> Unauthorized or unlawful manufacture, distribution, dispensing, sale, possession, consumption, use or being under the influence of alcohol, a controlled substance or illegal drug during working time, while performing work for the Company or at any time on Company premises; or **testing positive for alcohol or drugs on a test requested by the Company.**

(emphasis in Hughes's original letter to the EEOC).

Hughes argues in response that its position statement was written by Mr. Medina, an employee who did not make the actual decision whether or not to rehire Hernandez, and that therefore we should consider only the testimony of Ms. Bockmiller, the employee who reviewed Hernandez's application. However, given the inferences that must be drawn in favor of the non-moving party, even Bockmiller's testimony does not unequivocally support Hughes's position that Hernandez failed to make a *prima facie* showing of discrimination. It is true that Bockmiller testified that she did not know of Hernandez's history of drug addiction or of the reason for his leaving the company in 1991. However, she also testified that at the time of her review she pulled

Hernandez's entire personnel file, which would have included the 1991 drug test results. She also stated that, although she did not remember what Hernandez attached to his application, she would have seen any materials he submitted, which included the letter from his A.A. counselor. It would be reasonable to infer from the presence of this letter that Bockmiller was aware of the fact that Hernandez was a recovering alcoholic and that, with that knowledge, she would have checked the personnel file to determine the reason for his earlier termination. In short, the Bockmiller evidence, which itself permits an inference that she was aware of Hernandez's positive drug test, does not eliminate the question of fact that arises as a result of Hughes's explicit statements to the EEOC that the application was rejected because of Hernandez's prior drug addiction. Thus, Hernandez raises a genuine issue of material fact as to whether he was denied re-employment because of his past record of drug addiction.[10]

Hernandez must also demonstrate that he was a "qualified" individual for the job for which he sought rehire, that is, he must demonstrate that he has the "requisite skill, experience, education and other job-related requirements of the employment position." 29 C.F.R. § 1630.2(m). In 1991, when Hernandez resigned, his Employee Separation Sheet rated his work performance as both "good" and "fair."[11]

10. *See infra* note 18 (discussing additional basis for conclusion).

11. Out of four categories — excellent, good, fair, and, poor — Hernandez's ability was rated "good," his conduct, "fair," and his production, "fair." Given that these ratings were for the period in

(Cont'd)

Hernandez argues that because he performed his job satisfactorily for many years and had previously served in the position of Product Test Specialist, he should be deemed "qualified" under the ADA.[12] Hughes agrees with Hernandez as to his ability in 1991. However, it disputes his qualifications at the time he sought rehire in 1994. In February 1999, after Hernandez filed this action, Hughes offered him the position of Product Test Specialist if he passed the necessary examination. Although Hernandez was given time to study and prepare for the exam, upon taking it he completed only four out of eight sections and failed to receive a passing score on any of them. Hughes argues that in light of the 1999 test results, there is no genuine issue as to whether Hernandez was qualified at the time he sought rehire in 1994.[13] Hernandez argues on the other hand that simply because he failed the examination in 1999 does not mean he would have failed it in 1994, a date considerably closer to the time during which he satisfactorily performed the job. Thus, the dispute boils down to the fact that Hernandez was qualified for the

(Cont'd)

which Hernandez struggled with drug and alcohol problems, it would be reasonable to infer that he had the ability to be a far better than average employee at the time of his "resignation."

12. The last position Hernandez held, Calibration Service Technician, was a higher position than that of Product Test Specialist. He had also previously tested for, and performed in, the position of Product Test Specialist.

13. The examination given in 1999 was identical to the one Hernandez would have taken in 1994 had he not been found ineligible for rehire.

job in 1991 and was not qualified in 1999.[14] We believe that, given these two facts, there is a genuine issue of material fact as to whether he was qualified in 1994.[15]

In sum, we hold that, with respect to Hernandez's *prima facie* case of discrimination, he presented sufficient evidence to preclude a grant of summary judgment. Accordingly, the burden switched to Hughes to offer a legitimate non-discriminatory reason for its actions. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981); *Smith v. Barton*, 914 F.2d 1330, 1340 (9th Cir. 1990).

Hughes states that Hernandez was not rehired because of its unwritten company policy not to rehire employees who were terminated or resigned in lieu of discharge due to their violation of the company's code of conduct. Hughes argues that this unwritten policy is not discriminatory against Hernandez or any other former employee who once had a drug problem because it does not single out such employees or treat them differently from employees who violated other personal conduct rules (such as fighting or stealing from the company).

14. If it is determined at trial that Hernandez was qualified in 1994 but is not today, Hernandez would be eligible for damages.

15. Notwithstanding its letter to the EEOC, Hughes does not contend in its brief on appeal that Hernandez is not a qualified individual because he has failed to show that he has been rehabilitated and is no longer taking drugs. *See* § 12114(b). We note, however, that the letter from A.A. that Hernandez submitted along with his application, and his own affidavit to the effect that he is now drug and alcohol free, are sufficient to give rise to a genuine issue of fact as to that question.

Although the ADA does not protect an employee or applicant who is currently engaging in illegal drug use, *see* § 12114(a), it does protect qualified individuals with a drug addiction who have been successfully rehabilitated. *See* § 12114(b); U.S. EEOC, A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act §§ 8.2, 8.5 (1992) [hereinafter EEOC Manual] ("An employer may not discriminate against a drug addict, who is not currently using drugs and who has been rehabilitated, because of a history of drug addiction."). Thus, Hughes's unwritten policy against rehiring former employees who were terminated for any violation of its misconduct rules, although not unlawful on its face, violates the ADA as applied to former drug addicts whose only work-related offense was testing positive because of their addiction. If Hernandez is in fact no longer using drugs and has been successfully rehabilitated, he may not be denied re-employment simply because of his past record of drug addiction.[16]

Moreover, even if it were correct that Bockmiller was not aware of Hernandez's record of drug addiction at the time she rejected his application, Hughes's decision not to re-employ him because of his prior "termination" would violate

16. It is interesting to note that Hughes puts a long time employee who is fired for drug use and has since been rehabilitated in a less favorable position than a new applicant who is a current drug user. Hughes does not exclude from employment a new applicant who may be a drug user. A new applicant must take a drug test in order to qualify for employment. If he tests positive for drug use, he is not automatically excluded from working for Hughes; rather, he is ineligible for 12 months but may re- apply after that time period has passed. In contrast, a long time employee who slips is barred forever.

the ADA. If Bockmiller in fact did not know the reasons for Hernandez's "termination," her lack of knowledge would have been due solely to Hughes's unlawful policy which shields its employees from the knowledge that an employment decision may be illegal. Maintaining a blanket policy against rehire of *all* former employees who violated company policy not only screens out persons with a record of addiction who have been successfully rehabilitated, but may well result, as Hughes contends it did here, in the staff member who makes the employment decision remaining unaware of the "disability" and thus of the fact that she is committing an unlawful act. Having willfully induced ignorance on the part of its employees who make hiring decisions, an employer may not avoid responsibility for its violation of the ADA by seeking to rely on that lack of knowledge.[17] Accordingly, Hughes's unwritten policy is not a "legitimate, nondiscriminatory reason" for its rejection of Hernandez's application.[18] *Burdine*, 450 U.S. at 254.

In sum, we hold that Hernandez has made a *prima facie* case of discrimination on the basis of a disability. He has presented sufficient evidence from which a jury could conclude

17. There is no question that Hughes applied this policy in rejecting Hernandez's application. It has repeatedly emphasized and argued that the rejection was based solely on its policy not to rehire those who previously violated company rules.

18. It also follows that Hernandez has established a *prima facie* case that the cause for the rejection of his application was his prior record of addiction, whether the individual who made the decision to reject was aware of the specific reason for his prior termination or whether she failed to examine the file as a result of Hughes's unlawful blanket policy. *See supra* discussion at pp. 1042-43.

that he was "qualified" for the position he sought in 1994 and that his application was rejected because of his record of drug addiction. Additionally, we hold that a policy that serves to bar the re-employment of a drug addict despite his successful rehabilitation violates the ADA. Therefore, Hughes's unwritten policy that it will not rehire employees who left the company due to violations of personal conduct rules violates the ADA, as applied to employees with the disability of drug addiction whose only work-related offense was testing positive for drug use but are now rehabilitated.[19] Accordingly, summary judgment was improper.[20] We reverse and remand for proceedings consistent with this opinion.

REVERSED and REMANDED.

19. We note that Hughes has not raised a business necessity defense, *see* 42 U.S.C. § 2113(a), and we do not consider when, if ever, such a defense might be available with respect to the hiring of a rehabilitated drug addict.

20. We affirm, however, the district court's ruling that Hernandez failed to timely raise his claim of disparate impact. This claim is not pled in the complaint nor did Hernandez raise it prior to the close of discovery. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000). Accordingly, we grant Hughes's motion to strike the portions of Hernandez's Reply Brief that discuss his disparate impact claim.

Appendix A

ORDER AND DENIAL OF REHEARING DATED AUGUST 12, 2002

REINHARDT, Circuit Judge.

The opinion filed June 11, 2002, is amended as follows:

1. At page 8468, line 11 of the slip opinion, replace "discriminates on account of past disability against" with "screens out."

2. At page 8469, line 7 of the slip opinion, replace "who were terminated for illegal drug use in the work-place" with "whose only work-related offense was testing positive for drug use."

3. At page 8469, line 8 of the slip opinion, insert the following footnote after "rehabilitated.": "We note that Huges has not raised a business necessity defense, *see* 42 U.S.C. § 2113(a), and we do not consider when, if ever, such a defense might be available with respect to the hiring of a rehabilitated drug addict."

With these amendments, the panel has voted to deny the Petition for Rehearing and Petition for Rehearing En Banc.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35.

The Petition for Rehearing and Petition for Rehearing En Banc are DENIED.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-15512
CT/AG#: CV-98-00319-JMR

JOEL HERNANDEZ,

Plaintiff - Appellant,

v.

HUGHES MISSILE SYSTEMS COMPANY, an Arizona corporation; HUGHES AIRCRAFT COMPANY, a Delaware corporation; RAYTHEON COMPANY, a Delaware corporation,

Defendants - Appellees.

JUDGMENT

APPEAL FROM the United States District Court for the District of Arizona (Tucson).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Tucson) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is REVERSED and REMANDED.

Filed and entered — 6/11/02 and Amended 8/12/02.

APPENDIX B — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA FILED JANUARY 31, 2001

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CV 98-319 TUC JMR

Joel Hernandez,

Plaintiff,

v.

Hughes Missile Systems Company Corporation, An Arizona Corporation; Hughes Aircraft, Co., A Delaware Corporation; and Raytheon, Co., A Delaware Corporation,

Defendants.

ORDER

Pending before the Court is Defendants' "Motion for Summary Judgment." After reviewing the parties' briefs, considering all the evidence, and hearing oral argument[1],

IT IS ORDERED that Defendants' Motion for Summary Judgment is **GRANTED**.

---

1. The Court did not consider Plaintiff's theory of disparate impact due to Plaintiff's failure to plead or raise the theory in a manner consistent with *Coleman v. The Quaker Oats Company*, 2000 WL1720620 **16-19 (9th Cir. Nov. 20, 2000).

Appendix B

Dated this 30 day of January, 2001.

s/ John M. Roll
JOHN M. ROLL
U.S. District Judge

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Case No. CIV-98-319-T-JMR

JOEL HERNANDEZ,

Plaintiff,

v.

HUGHES MISSILE SYSTEMS CO., et al.,

Defendant.

JUDGMENT IN A CIVIL CASE

X DECISION BY COURT. This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendants' Motion for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED that judgment is entered in favor of defendants and against the plaintiff.

January 31, 2001
Date

RICHARD H. WEARE
CLERK

s/ Renee Ludeke
(By) Renee Ludeke, Deputy Clerk

APPENDIX C — STATUTES INVOLVED

42 U.S.C. § 12102

§ 12102. Definitions

As used in this chapter:

* * *

(2) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

* * * *

Appendix C

42 U.S.C. § 12111

§ 12111. Definitions

As used in this subchapter:

* * *

(6) Illegal use of drugs

(A) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C.A. § 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C.A. § 812].

* * * *

Appendix C

42 U.S.C. § 12114

§ 12114. Illegal use of drugs and alcohol

(a) Qualified individual with a disability

For purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction

Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use; except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

(c) Authority of covered entity

A covered entity—

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that—

(A) employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

(d) Drug testing

(1) In general

For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) Construction

Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

* * * *